IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34767

ALECIA SHELTON aka ABERNATHY,	)	**2008 Unpublished Opinion No. 657**
	)	
Plaintiff-Respondent,	)	**Filed: September 26, 2007**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
WILLIAM SHELTON,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge. Hon. Terry R. McDaniel, Magistrate.

Order of the district court, on appeal from the magistrate division, affirming order dismissing motion to modify child support and order denying motion for reconsideration, affirmed.

William Shelton, Boise, pro se appellant.

Paul E. Riggins, Boise, for respondent.

PERRY, Judge

William Shelton appeals from the district court's order affirming the magistrate's dismissal of Shelton's motion to modify child support and the denial of his motion to reconsider. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

Shelton and Alecia Abernathy were granted a divorce in 1995. Shelton was ordered to pay child support for the parties' minor child. In March 2002, Shelton filed a motion to modify his child support obligation, alleging a substantial and material change in circumstance due to losing his job after pleading guilty to a sex crime. Shortly after filing the motion to modify, Shelton was sent to prison. In September 2002, the district court entered an order of dismissal because the parties had stipulated to a withdrawal of Shelton's motion to modify.

In April 2003, Shelton filed another motion to modify his child support obligation. Again, Shelton asserted a substantial and material change in circumstances based on his incarceration and loss of his job. The magistrate denied Shelton's motion and awarded costs and attorney fees to Abernathy because it concluded Shelton's motion constituted "vexatious and/or harassing modification litigation."

In October 2006, Shelton again filed a motion to modify his child support obligation. Essentially, Shelton argued that his continued incarceration and payment of child support had depleted his assets constituting a substantial and material change in circumstances. Abernathy filed an answer alleging that Shelton's motion to modify should be dismissed because no substantial and material change in circumstances had occurred since Shelton's similar motions in 2002 and 2003. Shelton filed a response to Abernathy's answer, and the magistrate held a hearing on Abernathy's motion to dismiss.

At the hearing, Shelton admitted that he had $40,531 in a retirement account and that he recently received $44,680.99 from the sale of a duplex he owned. However, Shelton argued that his brother, who lived out of state, was responsible for Shelton's finances, and Shelton explained that his brother had spent all of the proceeds from the sale of the duplex paying off Shelton's debts. Shelton attempted to introduce a handwritten letter with an accounting that purported to be from his brother outlining where the $44,680.99 had been spent. However, the magistrate sustained a hearsay objection to the letter's admission into evidence. Additionally, the magistrate refused to allow Shelton to explain how the proceeds from the sale of the duplex had been spent because Shelton did not "have any direct knowledge of what those funds went to."

The magistrate granted Abernathy's motion and dismissed Shelton's motion for modification without prejudice. The magistrate instructed Shelton that, "if you want to refile this and you are going to have your brother testify about where all of those funds went, then you may do so." Shelton filed a motion to reconsider the dismissal of his motion to modify but did not present any further admissible evidence from his brother. The magistrate denied Shelton's motion.

Shelton appealed to the district court. Shelton's notice of appeal to the district court stated that he was challenging the "order denying motion to reconsider the order dismissing motion without prejudice the motion to modify child support." The district court held a hearing and issued an order addressing both the dismissal of Shelton's motion to modify child support

and the denial of his motion to reconsider. The district court affirmed the magistrate's dismissal of Shelton's motion to modify and the denial of Shelton's motion for reconsideration. Shelton again appeals.

II.
STANDARD OF REVIEW

On review of a decision of the district court, rendered in its appellate capacity, we review the decision of the district court directly. *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008). We examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Id.* If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Id.*

III.
ANALYSIS

Abernathy contends that Shelton is only appealing from the denial of his motion to reconsider. To support this proposition, Abernathy cites to the notice of appeal to the district court. However, because the district court addressed both the motion to modify and the motion to reconsider, we will do likewise.

Next, Abernathy contends that Shelton's motion to reconsider was untimely. However, Abernathy failed to assert the argument regarding the timeliness of Shelton's motion to reconsider before the magistrate and on intermediate appeal before the district court. Accordingly, for the purpose of this opinion only, we will assume without deciding that Shelton's motion to reconsider was timely filed.

A. Motion to Modify Child Support

An existing order or decree of child support may be modified "only upon a showing of a substantial and material change of circumstances." I.C. § 32-709(1). Therefore, a motion to modify child support must state a substantial and material change in the moving party's circumstances since the last order affecting support obligations. *Kornfield v. Kornfield*, 134 Idaho 383, 385, 3 P.3d 61, 63 (Ct. App. 2000). In an action to modify child support, the party seeking the modification carries the burden of proof. *Humberger v. Humberger*, 134 Idaho 39, 43, 995 P.2d 809, 813 (2000); *Pace v. Pace*, 135 Idaho 749, 752, 24 P.3d 66, 69 (Ct. App. 2001).

Modification of child support on the ground of material change in circumstances is within the sound discretion of the trial court and will not be altered on appeal unless there is a manifest abuse of discretion. *Ireland v. Ireland,* 123 Idaho 955, 959, 855 P.2d 40, 44 (1993); *Margairaz v. Siegel,* 137 Idaho 556, 558, 50 P.3d 1051, 1053 (Ct. App. 2002). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

A parent's incarceration does not automatically relieve child support obligations, nor does it shift the burden of proof from the movant. *Nab v. Nab,* 114 Idaho 512, 521, 757 P.2d 1231, 1240 (Ct. App. 1988). In *Nab,* the incarcerated father moved to modify his child support obligations on the basis of his incarceration. This Court determined that an incarcerated parent may file a motion to modify child support payments based on a substantial and material change of circumstances. However, this Court concluded that incarceration does not relieve the moving party from his or her burden of proof in showing a substantial and material change in circumstances. Furthermore, incarceration alone is not a per se substantial and material change in circumstances, but economic circumstances due to incarceration may form a valid basis for modification. *Id.* at 519, 757 P.2d at 1238. Therefore, Nab's case was remanded for the magistrate to determine what assets and income were presently available to the incarcerated father. *Id.* at 521, 757 P.2d at 1240.

On appeal, Shelton asserts a variety of claims, many of which are based in areas of law other than child support. For example, Shelton cites to post-conviction relief cases involving due process notice requirements and summary dismissal standards. We decline to address those misguided arguments. Shelton's primary argument is that his incarceration and continued child support obligation have created a substantial and material change in his economic circumstances. However, as both the magistrate and the district court concluded, Shelton failed to produce admissible evidence documenting his changed economic circumstances. Shelton bears the burden of proving a substantial and material change in circumstances and, without presenting admissible evidence, Shelton has failed to meet that burden.

Before the magistrate, Shelton attempted to introduce into evidence a handwritten accounting that demonstrated where his brother had spent the $44,680.99 that Shelton received from the sale of a duplex. However, even Shelton's response to Abernathy's answer indicates that "this permanent change of circumstances [referring to the depletion of the equity in the duplex he owned] has since occurred *or soon will."* (Emphasis added). Abernathy objected to the handwritten accounting on hearsay grounds, and the magistrate sustained the objection. Additionally, the magistrate would not allow Shelton to testify as to where the money went as Shelton had no personal knowledge of that because his brother was the one responsible for his finances. The handwritten note was also not verified. *See BMC West Corp. v. Horkley*, 144 Idaho 890, 897, 174 P.3d 399, 406 (2007) (verification means made in the presence of an authorized officer, such as a notary public). Because the note was not verified, it could have been written by anyone.

In addition to the lack of admissible evidence regarding the $44,680.99 that Shelton received from the sale of a duplex, Shelton conceded that he had a statement from 2003 showing $40,531 in a retirement account. The magistrate and Shelton had the following discussion regarding Shelton's retirement account:

> COURT: . . . You know, this [retirement account] is still available to you. So you have the ability, under your [retirement] account, to draw the money that you contributed in there out; and you could take that out and pay her.
> SHELTON: And then live on welfare when I'm retired?
> COURT: Well, that's a choice you have to make.
> SHELTON: Well, the choice that I'm trying to make is to have my retirement fund for when I retire.
> COURT: Well, what about your--the child support? What about the child?
> SHELTON: Well, [Abernathy] has adequate income.
> COURT: But what's your responsibility to the child, with the child?
> SHELTON: I don't have income.

This conversation demonstrates, and Shelton has maintained since his initial motion to modify in 2002, that his "choice" was not to withdraw funds from his retirement account to support his child but, rather, to save that money for his own benefit upon retirement. Shelton has not demonstrated any change, let alone a substantial and material change, regarding his retirement account.

Because the district court determined that Shelton had not provided admissible evidence regarding a substantial and material change in his economic circumstances, it affirmed the magistrate's dismissal of Shelton's motion to modify child support. We agree with the district court's analysis and conclusion. Shelton has the burden of demonstrating a substantial and material change in circumstances before his child support order can be modified. Shelton has failed to provide admissible evidence to meet that burden. Therefore, we conclude the district court did not err in affirming the magistrate's dismissal of Shelton's motion to modify child support.

B. Motion to Reconsider

The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court. *Campbell v. Reagan*, 144 Idaho 254, 258, 159 P.3d 891, 895 (2007); *Carnell v. Barker Mgmt. Inc.*, 137 Idaho 322, 329, 48 P.3d 651, 658 (2002). In this case, the district court affirmed the magistrate's denial of Shelton's motion to reconsider because Shelton had presented no new arguments and introduced no new admissible evidence before the magistrate to accompany his motion for reconsideration. Again, we agree with the district court's analysis. Therefore, we conclude that the district court did not err in affirming the magistrate's denial of Shelton's motion to reconsider.

C. Costs and Attorney Fees

Abernathy requests attorney fees pursuant to I.C. §§ 12-121, 12-123, and I.A.R. 41. An award of attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party, and such an award is appropriate when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Rendon v. Paskett*, 126 Idaho 944, 945, 894 P.2d 775, 776 (Ct. App. 1995). An award of attorney fees may be granted under I.C. § 12-123 if a civil action is brought merely to harass or injure another party or if it is not supported in fact or warranted under existing law and cannot be supported by a good faith argument. I.C. § 12-123. Although Abernathy is the prevailing party in this appeal, we do not find this appeal frivolous and, therefore, decline to award attorney fees pursuant to I.C. § 12-121. Additionally, because we do not find this appeal was brought merely to harass or injure and because we conclude it is supported by a good faith argument, we decline to award attorney fees pursuant to I.C. § 12-123.

IV.
CONCLUSION

Shelton did not sustain his burden by providing admissible evidence demonstrating a substantial and material change in circumstances to support his motion to modify child support. Therefore, the district court's order affirming the magistrate's dismissal of Shelton's motion to modify his child support obligation is affirmed. Additionally, because Shelton presented no new arguments or admissible evidence with his motion to reconsider, we affirm the district court's order affirming the magistrate's denial of that motion as well. Finally, costs, but not attorney fees, are awarded to Abernathy as the prevailing party.

Judge LANSING, **CONCURS.**

Chief Judge GUTIERREZ **DISSENTS**

I respectfully dissent, based on my view that this case has not been considered in light of the applicable standard. Shelton filed an affidavit in support of his motion to modify and in response to the motion to dismiss. A summary judgment standard was therefore applicable and all facts and inferences from the record are to be viewed in favor of the non-moving party. *Busse v. Busse*, 141 Idaho 566, 567, 113 P.3d 224, 225 (2005). Shelton's assertions regarding his income and assets and length of incarceration constitute a substantial and material change in circumstances sufficient to overcome what turned out to be a motion for summary judgment. I would therefore remand for the trial court to determine what assets and income are presently available, and if warranted to modify the decree appropriately. *See Nab v. Nab*, 114 Idaho 512, 520, 757 P.2d 1231, 1239 (Ct. App. 1988).